

STATE OF MICHIGAN
COURT OF APPEALS

DOUGLAS H. JONES, Next Friend of KELLY A.
JONES, Minor,

UNPUBLISHED
April 25, 2006

Plaintiff-Appellant,

v

No. 258974
Oakland Circuit Court
LC No. 2003-054558-NI

DEBORAH A. WHEELOCK,

Defendant-Appellee,

and

FORD MOTOR COMPANY,

Defendant.

Before: Neff, P.J., and Saad and Bandstra, JJ.

NEFF, J. (*dissenting*).

I respectfully dissent. I would reverse the grant of summary disposition because Kelly's impairment, although of short duration, completely incapacitated her and affected her general ability to lead her normal life. Thus, plaintiff met the threshold of a serious impairment of body function.

The standard established in *Kreiner v Fischer*, 471 Mich 109, 133-134; 683 NW2d 611 (2004), requires consideration of objective factors in determining whether an injury constitutes a serious impairment of an important body function, such as: the nature and extent of the impairment, the type and length of treatment required, the duration of the impairment, the extent of any residual impairment, and the prognosis for eventual recovery. *Kreiner* instructs that none of the individual factors are intended to be dispositive by themselves. *Id.* "For example, that the duration of the impairment is short does not necessarily preclude a finding of a 'serious impairment of body function.'" *Id.* at 134.

Kelly was struck by a car driven by defendant Wheelock on October 30, 2003. She was a sophomore in high school at the time, participated in marching band and other extracurricular activities, and worked part time. She suffered severe knee injuries, including complete tears of the anterior cruciate ligament and medial collateral ligament. Reconstructive knee surgery was performed on December 11, 2003, by Dr. Linard, and a permanent screw was inserted in her knee joint. Kelly was essentially incapacitated from the time of the accident through her

recovery from surgery. She had to forgo many high school activities and continues to suffer limitations from her injuries in the accident.

In ruling on the motion for summary disposition, the trial court noted that the doctor who performed defendants' independent medical evaluation, Dr. Lee, stated in his deposition that he did not expect Kelly's injury to impair her life in the future and that she would have no need to wear a knee brace for sports or any other activities after full healing. However, at her last examination, Dr. Linard had prescribed a brace for Kelly to wear if needed, and Kelly testified that if she wanted to continue with marching band in the fall of 2004, she had to wear the brace.¹

In assessing whether the course of one's normal life has been affected, a court should compare the individual's lifestyle before and after the injury. *Id.* at 132. In this case, given her age, the effect of her injury on her high school career, and the continuing limitations from her knee impairment, Kelly's post-accident life differs significantly from her pre-accident life.

After the accident and reconstructive surgery on her knee, Kelly reportedly attended 34 sessions of physical therapy between January and March of 2004. She was off work for eleven weeks. From the time of the accident through recovery from her knee surgery, she was incapacitated. She missed cheerleading tryouts, which were held shortly after her accident. She could not participate in marching band or her robotics team event. She attended the robotics nationals in Georgia, but could not walk from place to place with the school group and had to be driven. She could not pursue her other normal activities, such as jogging or shopping for long periods. In sum, the injury kept her from participating in high school as a normal teenager.

Kelly was released for unrestricted activity in March 2004, but at the time of her deposition in May 2004, she testified that she continues to experience pain and swelling in her knee, particularly when she stands for any length of time or walks for any distance. Standing on her feet for more than three hours bothers her knee.

Defendant's expert, Dr. Lee, acknowledged that the length of Kelly's impairment from her surgery was at least eighteen months:

When you put in an anterior cruciate graft, the body sends little blood vessels into the ligament and bone and more or less strengthens the graft, both the bony attachment and the ligament itself. And everyday walking, stretching, bending puts stress on that ligament, and there is [sic] microscopic changes in the ligament to give it strength. And that whole process takes 18 months.

Likewise, Kelly testified in May 2004 that she had not resumed physical activities such as basketball because she was told that it was best to wait until she had fully recovered. Given "the seriousness of the initial injury, the treatment required, and the duration of disability," Kelly

¹ Given this evidence, the trial court erred in relying on the conclusions from the IME by failing to view the evidence in a light most favorable to plaintiff.

sustained a serious impairment of body function. *Kern v Blethen-Coluni*, 240 Mich App 333, 343; 612 NW2d 838 (2000).

While certain limitations might not rise to the level of a serious impairment for some people, they may for others depending on that person's life context, even if the impairment itself is of short duration and the person has no physician-imposed restrictions on activity. *Williams v Medukas*, 266 Mich App 505, 508-509; 702 NW2d 667 (2005). In *Williams*, this Court found a serious impairment of body function after the plaintiff suffered a fractured right shoulder and a fractured left hand, rendering his arms useless for one month, even though the plaintiff returned to work and his coaching position three months after the accident with no restrictions, because he was nevertheless precluded from demonstrating basketball shots in coaching students and could no longer golf, which he had avidly pursued before the accident.² *Id.* at 506, 509.

An injury need not be permanent to be a "serious impairment of body function." *Kreiner*, *supra* at 134-135. Where an injury sustained in an automobile accident involves reconstructive knee surgery for an active teenager, completely incapacitates her during recovery, and precludes her normal activity for a minimum of eighteen months during high school, her "general ability to lead her normal life" has been affected. To disregard the extent of Kelly's impairment, in view of her eventual recovery, is contrary to the standard in *Kreiner*.

I would reverse summary disposition for defendant and remand for trial.

/s/ Janet T. Neff

² Williams' physician had indicated that he would likely suffer limitations in his range of motion, which is not unlike Kelly's limitation of wearing the prescribed brace.